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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

JOHN P. FORD, WARDEN,
*Petitioner,*

v.

HORACE DWAYNE FORD,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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37pp

## QUESTIONS PRESENTED

I.

Did the decision by the United States Court of Appeals for the Eleventh Circuit improperly ignore the actual conflict of interest test set forth by this Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), by assuming that an actual conflict of interest arose in this case without finding the existence of an adverse impact on the lawyer's performance?

II.

Did the decision by the Eleventh Circuit Court of Appeals finding an actual conflict of interest in this case create a per se bar against multiple representation?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | 2 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional and Statutory Provisions | 3 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | |
| I. The Eleventh Circuit Court of Appeals improperly ignored the test for finding an actual conflict of interest as promulated in *Cuyler v. Sullivan,* 446 U.S. 335 (1980) by assuming, without factual support, that an actual conflict of interest existed | 5 |
| II. The decision by the Eleventh Circuit Court of Appeals in finding an actual conflict of interest to exist in this case has in effect created a per se bar against multiple representation in this circuit | 12 |
| Conclusion | 14 |
| Certificate of Service | 15 |

## TABLE OF AUTHORITIES


**Page(s)**

**Cases**

*Baty v. Balkcom*, 661 F.2d 391 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011 (1982) . . . . . 10

*Cuyler v. Sullivan*, 446 U.S. 335 (1980) . . . . 2, 8, 9, 12

*Ford v. Ford*, 749 F.2d 681 (11th Cir. 1985) . . . . . 1, 2, 4, 9, 12, 13

*Ford v. State*, 248 Ga. 241, 282 S.E.2d 308 (1981) . . . . . 4

*Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052 (1984) . . . . . 11

*United States v. Cronic*, ____ U.S. ____, 104 S.Ct. 2039 (1984) . . . . . 11

*Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) . . . . . 8

*Zuck v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) . . . . . 8

*Statutes Cited:*

28 U.S.C. § 1241(1) . . . . . 2

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## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, JOHN P. FORD, respectfully prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on January 2, 1985, and the denial of a timely motion for rehearing, entered on March 25, 1985.

## OPINIONS BELOW

The Eleventh Circuit Court of Appeals entered its opinion remanding the case to the district court for the issuance of the writ on January 2, 1985. A copy of said opinion is included in the Appendix to this petition and is reported as *Ford v. Ford*, 749 F.2d 681

(11th Cir. 1985). Pursuant to the request for rehearing, said opinion was modified on March 25, 1985 but relief was denied in all other respects. A copy of this opinion is also included in the Appendix to this petition.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 2, 1985. *See Ford v. Ford*, 749 F.2d 681 (11th Cir. 1985). A timely suggestion for rehearing *en banc* was filed but was denied by the court on March 25, 1985. This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1241(1).

## QUESTIONS PRESENTED

I.

Did the decision by the United States Court of Appeals for the Eleventh Circuit improperly ignore the actual conflict of interest test set forth by this Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), by assuming that an actual conflict of interest arose in this case without finding the existence of an adverse impact on the lawyer's performance?

II.

Did the decision by the Eleventh Circuit Court of Appeals finding an actual conflict of interest in this case create a per se bar against multiple representation?

## CONSTITUTIONAL PROVISIONS

*Sixth Amendment, United States Constitution:*

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

## STATEMENT OF THE CASE

Horace Dwayne Ford, Respondent in this Court, Appellant in the Court of Appeals and Petitioner in the district court, was jointly indicted with his brother, Thomas Gary Ford, and Pearlie Mae Berry on one count of armed robbery and one count of murder in the Superior Court of Dekalb County, Georgia. Respondent and his brother retained one attorney to represent them. Prior to trial, Pearlie Mae Berry entered into an agreement with the State and was to be a witness against the two brothers. As the State was seeking the death penalty, Respondent's case was severed from that of his brother's for trial. On October 6, 1980, Respondent pled guilty to armed robbery and murder and was sentenced to life imprisonment for each offense, with the sentences to run consecutively.

Respondent then filed a "writ for motion of a new trial" and withdrawal of plea in the Superior Court of Dekalb County in February, 1981. By agreement of counsel for both parties, the pleading was treated as a state habeas corpus petition and a hearing held thereon on March 9, 1981. The state habeas corpus court subsequently denied relief on April 6, 1981. The Supreme Court of Georgia granted the application for

a certificate of probable cause to appeal. On September 29, 1981, the Supreme Court of Georgia affirmed the judgment of the state habeas corpus court denying relief. *Ford v. State,* 248 Ga. 241, 282 S.E.2d 308 (1981).

Respondent then filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia. On March 8, 1983, the United States magistrate entered his report and recommendation, recommending that relief be denied. On April 25, 1983, the district court adopted the report of the magistrate and denied relief. Judgment was entered on behalf of the Petitioner on that same date.

Respondent filed a notice of appeal from the decision of district court and obtained a certificate of probable cause to appeal on May 25, 1983. The United States Court of Appeals for the Eleventh Circuit entered an opinion on January 2, 1985, in which the Court concluded that Respondent received ineffective assistance of counsel because his attorney labored under an actual conflict of interest and that Respondent's pleas of guilty were, in turn, not knowingly and voluntarily entered. *Ford v. Ford,* 749 F.2d 681 (11th Cir. 1985). Pursuant to a timely motion for rehearing, the court below modified its opinion on March 25, 1985, but denied the petition for rehearing in all other respects.

Petitioner now files the instant petition challenging the decision by the Eleventh Circuit Court of Appeals.

## REASONS FOR GRANTING THE WRIT

1. THE ELEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY IGNORED THE TEST FOR FINDING AN ACTUAL CONFLICT OF INTEREST AS PROMULGATED IN *CUYLER V. SULLIVAN,* 446 U.S. 335 (1980).

Respondent alleged that he received ineffective assistance of counsel in that his attorney labored under an actual conflict of interest in the attorney's joint representation of Respondent and Respondent's brother prior to the entry of their guilty pleas. This alleged conflict of interest was based upon the fact that Respondent's brother wanted to enter a plea of guilty while Respondent desired a jury trial. Accordingly, the magistrate correctly found that Respondent had shown nothing more than the mere possibility of a conflict of interest. The state had insisted that either both defendants plead guilty or be tried separately for the death penalty. Thus, separate counsel for each defendant would not have enabled Respondent's brother to plead guilty while Respondent was tried.

The district court adopted the report of the magistrate and denied relief on this issue. The Eleventh Circuit Court of Appeals, however, found that the two brothers had "divergent interests" and thereupon assumed that an actual conflict of interest existed in this case.

A cursory review of the facts in this case reveals that Respondent, his brother, and a third party were jointly indicted for armed robbery and murder Respondent

and his brother retained Stanley Nylen to represent them. The third party had separate counsel and eventually negotiated a deal to become a state's witness against Respondent and his brother. As the state was seeking the death penalty against Respondent and his brother, counsel moved for a severance of the trials as is permitted under Georgia law. The state had indicated that Respondent's case would be called first for trial, and the case was sounded for trial on a Monday morning.

At the state habeas corpus evidentiary hearing, Respondent's counsel testified that Respondent's brother had at some point indicated his desire to plead guilty while Respondent had insisted on a trial by jury. Counsel further testified that he attempted to engage in plea negotiations with the state, although his initiation of these discussions was not prompted by the desire of Respondent's brother to plead guilty. Counsel further testified that the state had adamantly insisted, up until the Friday preceding the Monday's call of Respondent's case for trial, that no pleas would be accepted. However, on that Friday, the prosecutor relaxed his stand and indicated he would consider a plea bargain but that both brothers would have to plead guilty.

On Monday, October 6, 1980, Respondent's case was sounded for trial. Later in the day, counsel had a conference with Respondent and Respondent's brother wherein they discussed Respondent's decision to be tried. Counsel testified that Respondent's brother and Respondent's mother insisted that Respondent plead guilty in order to spare the family further pain. Respondent, however, refused. Counsel

testified that he explained the evidence and the existance of statutory aggravating circumstances and further indicated that he thought that the state could successfully obtain a death sentence against each defendant. Counsel never attempted to persuade either brother to change his mind. Out of fear that his brother would receive a death sentence, Respondent indicated he would plead guilty to the offenses. After Respondent indicated his willingness to plead guilty, the two brothers were taken before the trial judge and entered guilty pleas.

The magistrate found as fact that Respondent and his brother had jointly retained the same attorney, that Respondent had been informed the trial court would not accept a guilty plea and bargained sentence from only Respondent's brother if Respondent insisted upon a jury trial, that the attorney had prepared to represent Respondent and his brother in separate trials, that a third co-defentant had become a state's witness and would probably testify against Respondent, that the attorney relayed information to the two co-defendants that their mother wanted them to plead guilty, and that Respondent's brother had urged Respondent to plead guilty to spare their mother further pain. The magistrate concluded that Respondent had raised nothing more than the mere possibility of a conflict of interest as he had not shown that an actual conflict of interest arose. The magistrate noted that any coercion to induce Respondent to enter a guilty plea came from Respondent's family, not the defense attorney, so that separate counsel for the two co-defendants would not have alleviated the problem of the state's adamant refusal to accept a guilty plea from only one brother. The magistrate concluded that

the decision to enter the guilty plea was Respondent's own decision so that his brother could also plead guilty, despite the fact that the attorney was ready and willing to represent Respondent at his jury trial had Respondent elected to proceed to trial.

The district court, after considering Respondent's objections to the magistrate's report, totally adopted the magistrate's findings. Respondent's application for relief was denied.

The United States Court of Appeals for the Eleventh Circuit found the Respondent's attorney labored under an actual conflict of interest based solely on the fact that the attorney simultaneously represented two co-defendants, one of whom wished to plead guilty and the other of whom wished to be tried. The Eleventh Circuit acknowledged the actual conflict test promulgated by this Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The court below, in its initial opinion, then turned to a case decided prior to *Cuyler* for the definition of actual conflict. This case, *Zuck v. State of Alabama*, 588 F.2d 436 (5th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979), had defined an actual conflict of interest as "when a defense attorney places himself in a situation inherently conducive to divided loyalties." Upon Petitioner's motion for rehearing, however, the court below amended its order to delete the *Zuck* definition and relied instead upon the definition of actual conflict in *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983).

Under *Westbrook*, an actual conflict exists where it is shown that a trial attorney "actively represented conflicting interests." 704 F.2d at 1499. In finding the

existence of an actual conflict of interest in this case, the court below never pointed to a specific instance wherein the attorney acted to the benefit or detriment of either Respondent or Respondent's brother. The court relied upon the mere fact that Respondent wanted to go to trial while Respondent's brother wanted to plead guilty, while totally ignoring that the state's position, i.e., both defendants plead guilty or both defendants be tried, created a factual situation wherein defense counsel *did not* have the opportunity to labor under a conflict of interest as he had available to him no choices to be made. The court below's finding of the actual conflict is as follows:

> The fact is undisputed that up until the day of trial, Horace Ford desired a jury trial while his brother and co-defendant Thomas Ford wished to plead guilty. Given this situation, it is obvious that the brothers' attorney was placed in a position of divided loyalties. The facts of this case clearly indicate that this attorney, however good his intentions, could not have represented both of these co-defendants without some conflict arising. It is obvious that both defendants had divergent interests.

*Ford v. Ford,* 749 F.2d at 682-83.

Aside from the lack of factual support for the appellate court's position, Petitioner submits that the decision in this case ignored the standard enunciated in *Cuyler v. Sullivan, supra.* In *Cuyler,* this Court held, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan,* 446 U.S. at 348. A defendant who shows

that a conflict of interest actually affected the quality of his representation need not show prejudice in order to obtain relief. *Id.* at 349. However, unless a defendant shows that his attorney "actively represented conflicting interests" he has not established a basis for relief. *Id.* at 350.

In *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 1011 (1982), the now Eleventh Circuit construed *Cuyler* as not requiring a defendant to show an adverse impact upon his attorney's performance where a defendant has also shown an actual conflict of interest to exist. By deleting this component of proof from its analysis of the facts in the instant case, the court below has in effect assumed that an actual conflict of interest existed without pointing to anything specific in the record to support such a finding. The court has ignored the fact that the state had adamantly refused even to discuss plea negotiations with the brothers' attorney up until the Friday before Respondent's case was called for trial on Monday. Thus, even had Respondent's brother had separate counsel, the record in this case clearly shows that that attorney would not have been successful in attempting to engage in plea negotiations on behalf of Respondent's brother as the state consistently insisted no plea discussions were possible. When the prosecutor then indicated some willingness to accept a bargained plea, the bargain was for both brothers to plead guilty or to be tried separately. Again, a separate attorney for Respondent's brother could not have successfully bargained for a plea agreement for Respondent's brother, given the state's position. This fact, coupled with the attorney's testimony that he merely relayed to the two

brothers the information that the state insisted both plead guilty or be tried separately and that the attorney never attempted to persuade either client to change his positon, clearly shows that no actual conflict of interest ever arose in this case. This lack of an actual conflict is further buttressed by the lack of any finding of an adverse impact upon the lawyer's representation of the two brothers. The court below simply assumed that at some point an actual conflict of interest must have arisen since one defendant wanted to plead guilty and the other wished to go to trial.

The court below, in construing *Cuyler,* has consistently ignored the requirement that a defendant must show, in addition to an actual conflict of interest, an adverse impact upon his attorney's performance. This adverse impact is not to be equated with a showing of prejudice. As this Court has consistently made clear, once a defendant has shown an actual conflict of interest to exist and an adverse impact upon his attorney's performance, then prejudice will be presumed. *United States v. Cronic,* ____ U.S. ____, 104 S.Ct. 2039 (1984); *Strickland v. Washington,* ____ U.S. ____, 104 S.Ct. 2052 (1984).

In sum, the decision of the court below has merely assumed an actual conflict of interest existed. Petitioner submits that no actual conflict of interest arose in this case as the record clearly shows any possible conflict remained speculative. The decision of the court below clearly shows that the court found no adverse impact upon the attorney's representation of the two brothers as that court cannot point to anything in the record to show an adverse impact. Accordingly, Petitioner would urge this Court to grant

certiorari on the basis that the court below has misconstrued and misapplied the actual conflict of interest test in *Cuyler v. Sullivan, supra.*

2. THE DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS IN FINDING AN ACTUAL CONFLICT OF INTEREST TO EXIST IN THIS CASE HAS IN EFFECT CREATED A PER SE BAR AGAINST MULTIPLE REPRESENTATION IN THIS CIRCUIT.

In *Cuyler v. Sullivan, supra,* this Court noted that "... a possible conflict inheres in almost every instance of multiple representation...." *Cuyler v. Sullivan,* 446 U.S. at 348. Thus, this Court has fashioned a rule that a defendant must show the existence of an actual conflict and that this actual conflict adversely affected his lawyer's performance. Petitioner submits that the decision of the court below in this case, however, has in effect created a per se bar against multiple representation as the court merely assumed a conflict of interest arose in this case.

The court below noted that Respondent's decison to plead guilty was influenced by his mother's insistence that the two brothers plead guilty and that the state would waive the death penalty only if both brothers pled guilty. *Ford v. Ford,* 749 F.2d at 682. The court, however, totally ignored the testimony of Respondent's trial attorney who testified that he merely acted as a conduit of information to his clients concerning the state's position on any guilty pleas and the mother's insistence that both brothers plead guilty. Counsel testified that he never tried to persuade Respondent to plead guilty so that the brother could

plead guilty. The court below simply noted that despite "however good his intentions" were, the attorney could not have represented the two brothers "without some conflict arising." *Ford v. Ford*, 749 F.2d at 682-83.

Petitioner submits that the decision of the court below in finding a conflict of interest in this case is erroneous as it fails to examine the actions taken by the attorney on behalf of either client. By refusing to scrutinize the attorney's performance in this case in ascertaining whether or not an adverse impact affected the attorney's performance, the decision of the court below has created a per se bar against multiple representation as any conflict in this case remained hypothetical as the attorney never had the opportunity, due to the state's position, to make any choice that would be helpful to one client or harmful to the other. Without an examination of the specific conduct of counsel in relation to each client, as the decision of the court below failed to do, virtually any case involving multiple representation could sustain a finding of an "actual conflict."

//

## CONCLUSION

For all of the above and foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to review the decision by the Eleventh Circuit Court of Appeals.

/s/

WILLIAM B. HILL, JR.
Senior Assistant Attorney General
Attorney of Record for Petitioner

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

/s/

MARION O. GORDON
First Assistant Attorney General

/s/

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Assistant Attorney General

Please Serve:

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## CERTIFICATE OF SERVICE

I, William B. Hill, Jr., counsel of record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this date served three copies of the foregoing Petition for a Writ of Certiorari upon the Respondent by depositing three copies of same in the United States mail with sufficient first class postage affixed thereto, addressed to:

Alice C. Stewart
967 Juniper Street, N.E.
Atlanta, Georgia 30309

This 15th day of May, 1985.

/s/
WILLIAM B. HILL, JR.
Senior Assistant Attorney General
Counsel of Record for Petitioner

# APPENDICES

## APPENDIX A

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HORACE DWAYNE FORD,
*Applicant,*

vs.

JOHN P. FORD, Warden; and MICHAEL BOWERS, Attorney General of the State of Georgia,
*Respondents.*

CIVIL ACTION
C82-1640A

## MAGISTRATE'S REPORT AND RECOMMENDATION

### I. History of the Case.

On or about June 17, 1980 the applicant, Horace Dwayne Ford, together with his brother (John P. Ford) and Pearlie Mae Berry were indicted in Dekalb County for the armed robbery and murder of James R. Cutcliff. Respondent's Exhibit 2, pp. 3, 4, 21 (hereinafter "Exhibit 2.") The Ford brothers jointly retained Attorney Stanley Nylen to represent them,[1] and Nylen, *inter alia*, in due course filed Motions for Discovery and Severance[2] on behalf of each. Exhibit 2, pp. 7-20.

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[1] Respondent's Exhibit 1 (Transcript of Applicant's guilty plea) pp. 2, 4, 5, 6; Exhibit 2, pp [23-24, 26-27] 4, 5, 47-49; Respondent's Exhibit 3 (Transcript of State Habeas Corpus Hearing) pp. 6, 7 (hereinafter "Exhibit 3").

[2] In Georgia persons jointly indicted for a capital offense in which the death penalty is sought have a statutory right to separate trials. O.G.C. § 17-8-4 (Former Ga. Anno. Code Section 27-2101), which code section is attached hereto as appendix "A".

On the day scheduled for commencement of their trials each brother, while represented by Nylen, pleaded guilty to each of the two counts and each was sentenced to consecutive sentences of life imprisonment on each of the aforesaid two counts. Exhibit 1; Exhibit 2 (pp. 44-51); Exhibit 3, pp. 60-67.

## EXHAUSTION OF STATE REMEDIES

On or about January 20, 1981 the applicant filed, *pro se,* a pleading entitled "Writ for Motion of New Trial with Drawal of Plea." (sic), in the DeKalb Superior Court, which motion alleged, *inter alia,* that his guilty plea had been involuntary in that his retained attorney coerced him into pleading guilty by advising him that if he did not so plead, the court would not accept his brother's guilty pleas (thereby forcing his brother to a trial which, on conviction, might result in a sentence of death for John. Exhibit 2, pp. 37-41.

The trial court, even though it considered the "Motion" as an application for Writ of Habeas Corpus, appointed counsel (ultimately Alden Snead) to represent applicant. Exhibit 2, pp. 43, 59. In due course, on March 9, 1981, the matter came on for an evidentiary hearing before the trial court, which court denied the same on April 6, 1981 (after hearing the testimony of applicant and Mr. Nylen).[3] Mr. Sneed appealed the adverse ruling to the Georgia Supreme Court (Exhibit 2), which court considered it, and affirmed the denial on September 29, 1981. *See Ford v. State,* 248 Ga. 251, ____ S.E. 2d ____ (No. 37760) (Respondent's Exhibit 4). In its decision the Georgia Supreme Court

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[3] Nylen has since died.

held, as did the trial court, that (1) the applicant was not denied effective assistance of counsel because of a conflict of interest arising out of the joint legal representation by Nylen of the Ford brothers; and (2) applicant's plea was entered freely, voluntarily and, with understanding of the consequences; and that its acceptance did not require that the trial court find a factual basis to support the same—that in Georgia, unlike the requirements of Rule 11, F. R. Crim. P., a state court could constitutionally accept a guilty plea without a factual basis. Since the issues raised in the instant applicant are identical to the foregoing, exhaustion of state remedies has properly been conceded. *See* 3 of Respondent's October 1, 1982 answer; pp. 1-3 of Respondent's November 1, 1982 brief.

**II. Findings of Fact.**

This court finds that the state court proceedings comport with the requirements of 28 U.S.C. § 2254, thereby obviating the necessity for conducting a federal evidentiary hearing,[4] and require that this court accept as correct those findings of Fact made expressly or impliedly by the state court. *See also Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 126 (1981). Accordingly,

a. At the time the applicant pleaded quilty he was well aware of the plea bargain—that he would receive two consecutive life sentences (as would his brother): that the applicant entered his plea knowingly, freely and voluntarily, with full knowledge of the consequences;

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[4] The question of whether an accused has been denied effective assistance of counsel is a mixed question of law and fact.

b. That, prior thereto, the applicant had an adequate opportunity to confer with his attorney;

c. That he and his brother had jointly retained Mr. Nylen;

d. That prior to entering his plea, he had been advised that the trial court would not accept a guilty plea and bargained sentence from his brother if he persisted in his demand for a jury trial;

e. That neither the applicant, his brother, nor Mr. Nylen ever advised the trial court that Mr. Nylen might have a conflict of interest prior to acceptance of the guilty pleas;

f. That Nylen had prepared to represent the applicant and his brother in separate trials, and had made a tactical decision that neither could be permitted to testify;

g. That the third co-defendant had cooperated with the police, had made a statement incriminating them, and would probably be a prosecution witness in any such trial;

h. That Nylen had notified the brother that he had received a message from their mother (who was present in the courtroom with other family members) that she wanted both to plead guilty; and

i. His brother (and co-defendant) had already decided to plead guilty, and urged him to plead guilty so as to spare their mother further pain.

## III. CONCLUSIONS OF LAW.

a. **The Applicant Was Not Denied Effective Assistance of Counsel.**

At the onset it must be recognized here that we are

concerned only with the applicant's attorney's actions in connection with applicant's guilty plea, and not trial preparation or conduct. As was stated in *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), once a guilty plea has been entered all nonjurisdictional challenges are waived and only an attack on the voluntary and knowing nature of the plea can be sustained. In connection therewith the court is required to consider whether applicant's attorney's advice fell below the minimum required by the Sixth Amendment.[5] This must be reviewed to ascertain whether, as a consequence, applicant's subsequently entered plea represented an informed waiver of applicant's constitutional rights. *Mason v. Balcom*, 531 F.2d 717, 725 (5th Cir. 1976).

Neither are we concerned with a situation in which either co-defendant or Nylen requested that separate counsel represent each co-defendant. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 426, (1978). *Compare Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

We are, in short, faced with nothing more than the two issues reserved in *Holloway, supra*, and resolved in *Cuyler, supra*.

(1) Whether a trial court is required, *sua sponte*, to inquire into possible conflicts of interest involving joint representation. *Compare* Rule 44(c), F. R. Crim. P. *See also United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). As is noted in the Advisory Committee's notes accompanying the 1979 amendent to Rule 44, serious conflicts of interest may also arise when one or more

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[5] This test is set out in *Bradbury v. Wainwright*, 658 F.2d 1083 (5th Cir. 1981).

jointly represented defendants pleads guilty, quoting *United States v. Mari*, 526 F.2d 117, 120 (2d Cir. 1975) (concurring opinion of Oakes, J.), a case not unlike the case *sub judice*.

(2) Whether joint representation is presumptively prejudicial (i.e., whether the applicant has suffered actual, as opposed to potential, prejudice by virtue of such joint resolution).

In answer to the first question the Supreme Court held that the Constitution imposes no such duty on state court judges. It also held, in answer to the second question, although "a possible conflict inheres in almost every instance of multiple representation," and that a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial, "such a presumption would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack' " *Id.* at 348. Consequently, it held that joint representation was not to be considered, for constitutional purposes, as presumptively prejudicial, and imposed an affirmative duty to show actual prejudice on an accused who raised no objection to joint representation until after his conviction.

In the case *sub judice*, as in *Mira, supra*, the applicant has raised nothing other than the mere possibility of a conflict of interest—not actual prejudice. In addition thereto, it is apparent that the "coersion" which allegedly compelled the applicant to plead guilty would have been the same regardless of whether he and his brother were represented by separate counsel: In short, it was his decision to plead guilty so that a similar plea from his brother would also be accepted,

notwithstanding the undisputed fact that Nylen was ready and willing to represent him in a jury trial should he so desire.

It is therefore recommended that this application be denied as being without merit.

IT IS SO RECOMMENDED, this 8th day of March, 1983.

JOEL M. FELDMAN
United States Magistrate

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

HORACE DWAYNE FORD

vs. C82-1640

JOHN P. FORD, WARDEN

**ORDER**

The magistrate's report and recommendation of March 8, 1983, is made the order of this Court.

SO ORDERED, this 25th day of April, 1983.

/s/ CHARLES A. MOYE, JR.

CHARLES A. MOYE, JR.
United States District Judge

## APPENDIX C

Horace Dwayne FORD,

*Petitioner-Appellant,*

v.

John P. FORD, Warden,

*Respondent-Appellee.*

No. 83-8387.

United States Court of Appeals,
Eleventh Circuit.

Jan. 2, 1985.

Georgia prisoner sought federal habeas relief. The United States District Court for the Northern District Court for the Northern District of Georgia, Charles A. Moye, Jr., Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Daniel Holcombe Thomas, District Judge, sitting by designation, held that defendant, who along with his brother were represented by same counsel, was denied effective assistance as there was an actual conflict of interest in that brother wanted to plead guilty whereas defendant sought jury trial and the state would refrain from seeking death penalty only if both pled guilty, and that guilty plea was not knowing and voluntary.

Reversed and remanded.

**1. Criminal Law**

Defendant was denied effective assistance of counsel as there was an actual conflict of interest where same attorney represented defendant and his

brother, defendant wanted to proceed to trial whereas brother desired to plead guilty, under plea proposal that if both defendant and brother pled guilty the state would not seek the death penalty but would otherwise insist on death penalty and plea was entered on day of trial.

**2. Criminal Law**

Guilty plea was involuntary where defendant did not receive effective assistance of counsel in that there was actual conflict of interest by counsel who represented both defendant, who wanted jury trial, and defendant's brother, who wanted to plead guilty, and state would refrain from seeking death penalty only if both pled guilty.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS*, District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

This appeal is by Horace Ford regarding his request for habeas corpus relief. The district court adopted the magistrate's report and denied relief. The petitioner now appeals questioning the effectiveness of his assistance of counsel and the voluntariness of his guilty plea.

*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

## FINDINGS OF FACT

Horace Dwayne Ford, together with Pearlie Mae Berry, and Horace's brother, Thomas Gary Ford, were indicted in State Court for armed robbery and murder on June 17, 1980. The Ford brothers jointly retained one attorney to represent both of them.

Throughout the time period before the case was to come to trial Horace unequivocally expressed a desire to go to trial. On the other hand, his brother Thomas wanted simply to plead guilty and request mercy by the court in the sentencing. Horace contended that he was innocent and wanted that fact to be demonstrated to a jury.

The State of Georgia was willing to enter into a plea agreement with the Ford brothers whereby the State would not seek the death penalty if both Horace and Thomas would plead guilty. The alternative to the death penalty offered by the State was two consecutive life sentences. However, if both of the defendant Ford brothers would not plead guilty then the State would proceed to trial insisting on the death penalty. Co-defendant Berry had separate counsel and had worked out a plea arrangement with the State.

Eventually Horace Ford pled guilty on October 6, 1980, at 4:00 P.M. after his case was called for trial at 9:00 A.M. on the same day. There was evidence that Horace's decision was influenced by his mother's insistence and by the fact that the State would waive the death penalty only if both brothers pled. Thus, fearing his brother would die for his failure to pelad, Horace along with his brother Thomas, pled guilty on the day of trial.

As a result of his guilty plea, Horace Ford received one life sentence for murder and another life sentence for armed robbery. The two life sentences were to be served consecutively. Subsequently, Horace Ford sought habeas relief asserting that he received ineffective assistance of counsel and that his plea was not voluntarily made.

## CONCLUSIONS OF LAW

[1,2] In the present case since the same attorney represented two co-defendants; one defendant wanting to proceed to trial and the other defendant desiring to plead guilty, an obvious conflict of interest arose. Therefore, Horace Ford, the defendant who desired to go to trial but pled guilty sought habeas relief based upon the issue of the effectiveness of the assistance of counsel he received. Appellant Horace Ford contends that this dual representation with the resulting guilty pleas, coupled with other factors evidencing a conflict of interest violated Ford's Sixth Amendment right to counsel.

The United States Supreme Court has established a standard to aid in determining whether a defendant's Sixth Amendment rights are violated. The Court instructs that "(i)n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). If actual conflict does exist then the defendant need not show prejudice. *Id.* 446 U.S. at 349-50, 100 S.Ct. at 1718-19.

The Fifth Circuit has defined the term "actual conflict" in *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5th Cir.1979), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). There the Court stated that "(a)n actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties." Further, the court in *Zuck* noted that the mere possibility that defense counsel is tempted to be less zealous than he should be is sufficient to constitute actual conflict of interest as a matter of law. *Id.* at 439-40. The Court stated "a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client... [T]he mere existence of a temptation in the abstract is sufficient to preclude duality of representation." *Id.* at 440.

Applying the above standards to the facts of this case, this court holds that an actual conflict of interest did exist here; consequently, Horace Ford was denied his Sixth Amendment right to effective assistance of counsel. The fact is undisputed that up until the day of the trial, Horace Ford desired a jury trial while his brother and co-defendant Thomas Ford wished to plead guilty. Given this situation, it is obvious that the brothers' attorney was placed in a position of divided loyalties. The facts of this case clearly indicate that this attorney, however good his intentions, could not have represented both of these co- defendants without some conflict arising. It is obvious that the two defendants had divergent interests.

The issue of multiple representation in capital cases was addressed by the Georgia Supreme Court in *Fleming v. State*, 246 Ga. 90, 270 S.E.2d 185 (1980). In

*Fleming*, the same attorney represented co-defendants in a case in which the death penalty was sought. The court held "where the State seeks the death penalty against one defendant in a criminal transaction he and his co- defendant must be provided with separate and independent counsel." *Id.* 270 S.E.2d at 188. In Horace Ford's attempt to obtain habeas relief in state court, the Georgia Supreme Court declined to apply the *Fleming* rule to Ford's case. The Court stated that "*Fleming*" does not apply to all cases in which the death penalty could have been sought, but, instead, only to those cases in which the death penalty is being sought." *Ford v. State*, 248 Ga. 241, 282 S.E.2d 308, 309 (1981). In the present case we feel that *Fleming* should apply as the State was definitely seeking the death penalty for both defendants during the time of plea bargaining. During this time Horace Ford was insisting on going to trial and his brother, Thomas Ford, had already agreed to plead. So, up until the time Horace changed his plea (apparently against his will and better judgment), the death penalty was being sought. While we are not in complete agreement with *Fleming*, we do feel that the Supreme Court of Georgia should have applied it in the *Ford* case.

Another issue that the petitioner raised on this appeal was whether or not his guilty plea was knowingly and voluntarily made. This issue is necessarily related to the issue of effectiveness of asistance of counsel. The Eleventh Circuit has addressed this issue in *Scott v. Wainwright*, 698 F.2d 427, 429 (11th Cir.1983), wherein it stated, "[t]he guilty plea cannot have been knowing and voluntary, however, if a defendant does not receive reasonably effective assistance of counsel

in connection with the decision to plead guilty, because the plea does not then represent an informed choice."

In the present case this court has already determined that Horace Ford did not receive effective assistance of counsel. By virtue of the language of *Scott, supra*, Horace Ford's guilty plea was not knowing or voluntary and not the product of an informed choice.

For the reasons enumerated above, this Court is of the opinion that the petitioner-appellant's constitutional rights were not afforded him. Thus the judgment of the lower court in REVERSED and the cause is REMANDED with instructions to grant the writ conditioned upon the state's right to retry the petitioner within a reasonable time.

## APPENDIX D

Horace Dwayne FORD,

*Petitioner-Appellant,*

v.

John P. FORD, Warden,

*Respondent-Appellee.*

No. 83-8387.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1985.

Appeal from the United States District Court for the Northern District of Georgia.

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion January 2, 1985, 11 Cir., 1985, 749 F.2d 681).

Before GODBOLD, Chief Judge, CLARK, Circuit Judge, and THOMAS*, District Judge.

* Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

PER CURIAM:

The opinion in this case is amended as follows. The material beginning on p. 1377, second column, 749 F.2d 681 on p. 682, with the words "The Fifth Circuit has defined the term 'actual conflict' in *Zuck v. State of Alabama.*" and continuing to the end of that paragraph on p. 1378, on p. 682, is deleted and the following is substituted therefore:

> We have defined the term "actual conflict" in *Westbrook v. Zant,* 704 F.2d 1487 (11th Cir.1983). There we held that an actual conflict of interest exists when "petitioner shows that his trial counsel actively represented conflicting interests..." *Id.* at 1499. In *Westbrook* we found an actual conflict where appointed counsel for a defendant in a capital case also represented the county in which defendant was tried in a lawsuit challenging the composition of the county's jury lists. Westbrook's appointed counsel could not bring a jury composition challenge on Westbrook's behalf because such a challenge would have been directed against another client (the county). A jury composition challenge would have been a plausible argument for Westbrook. Appointed counsel's inability to make such a challenge because of the conflict of interest "render[ed] meaningless the sixth amendment guarantee to effective representation." 704 F.2d at 1499.

In all other respects the petition for rehearing is DENIED. No member of this panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

EDITOR'S NOTE

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CLERK

(2)

NO. 84-1821

In The

SUPREME COURT OF THE UNITED STATES

October Term of 1984

JOHN P. FORD, Warden,

Petitioner,

-v-

HORACE DWAYNE FORD,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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## TABLE OF CONTENTS


| | |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 1 |
| A. Course of Proceedings | 1 |
| B. Statement of Facts | 2 |
| REASONS FOR DENYING THE PETITION | 4 |
| A. Summary of the Argument | 4 |
| B. Argument | 4 |
| I. THE ELEVENTH CIRCUIT PROPERLY FOUND ACTIVE REPRESENTATION OF CONFLICTING INTERESTS AFTER CONSIDERATION OF THE FACTS. | 4 |
| (a) Independent review was appropriate. | 4 |
| (b) Only the facts necessary to the determination of active representation of conflicting interests were considered. | 5 |
| (c) A vigorous advocate must give independent advice. | 7 |
| (d) The plea was not the product of an informed choice. | 10 |
| II. NO PER SE BAR TO MULTIPLE REPRESENTATION HAS BEEN CREATED. | 11 |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 16 |

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| Baty v. Balkcom, 661 F.2d 391 (5th Cir. Unit B 1981), cert. den. 102 S. Ct. 2307 (1982) | 13 |
| Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) | 5 |
| Brady v. U.S., 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) | 10 |
| Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) | 13 |
| Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 270 (1962) | 14 |
| Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980) | 7,11,13,14 |
| Fleming v. State, 246 Ga. 90, 270 S.E.2d 185 (1980) | 12,13 |
| Ford v. Ford, 749 F.2d 681, 682 (11th Cir. 1985) | 5,6,7,12,13 |
| Ford v. Wainwright, 526 F.2d 919 (5th Cir. 1976) | 14 |
| Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975) | 13 |
| Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1960) | 6 |
| Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cert. den. 103 S.Ct. 1798 (1983) | 5 |
| Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) | 11,12,13 |
| Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938) | 14 |
| Marshall v. Lonberger, 459 U.S. 314, 103 S.Ct. 843, 74 L.Ed. 2d 646 (1983) | 4 |
| McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) | 10 |
| Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976) | 14 |
| Scott v. Wainwright, 698 F.2d 427 (11th Cir. 1983) | 7 |
| Stephens v. U.S., 595 F.2d 1066 (5th Cir. 1979) | 14 |
| Strickland v. Washington, 446 U.S. ____, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) | 5,7,8,9 |
| U.S. v. Alvarez,580 F.2d 1251, 1259 (5th Cir. 1978) | 13,14 |
| U.S. v. Cronic, 466 U.S. ____, 104 S.Ct. 2045, 80 L.Ed.2d 674 (1984) | 8 |

CASES


| | Page |
|---|---|
| U.S. v. Freeman, 619 F.2d 1112, (5th Cir. 1980), cert. denied, 101 S.Ct. 1348 (1981) | 13 |
| Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983) | 14 |


STATUTES AND OTHER AUTHORITIES


| | |
|---|---|
| 28 U.S.C. @2254(d) | 4 |
| Federal Rules of Criminal Procedure 44(c) | 14 |
| O.C.G.A. @17-8-4 (formerly Ga. Code Ann. 27-2101) | 2,8 |
| ABA Code of Professional Responsibility, DR 5-105, EC 5-15 (1976) | 14 |

NO. 84-1821

In The
SUPREME COURT OF THE UNITED STATES
October Term of 1984

JOHN P. FORD, Warden,

Petitioner,

-v-

HORACE DWAYNE FORD,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## JURISDICTION

Respondent does not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

The Eleventh Circuit Court of Appeals in the instant case has correctly applied the rulings of this Court. The petitioner's claim that this case creates a per se rule in the circuit is without merit. The decision was limited to the facts and circumstances in this case. The petitioner has not suggested any special or important reasons for granting the writ.

This Court should deny the discretionary review requested.

## STATEMENT OF THE CASE

### A. Course of Proceedings

The petitioner neglected to summarize several aspects of the evidence and proceeding below in the petition. Thus, an addition to the statements is necessary.

After Horace Ford's plea of guilty on October 6, 1980, in the Superior Court of Dekalb County, Georgia, respondent filed a pro se pleading entitled "writ of motion for new trial withdrawal of plea." The trial court indicated, in its memorandum

appointing counsel on the motion, that the pleading would be designated as a motion for new trial and withdrawal of a plea. At the outset of the hearing, the state argued that the pleading should be treated as a habeas petition and the court elected to do so. The state habeas court made no separate findings of fact and conclusions of law in its order of April 6, 1981, denying relief.

Horace Ford filed a pro se petition for federal habeas corpus relief in the Northern District of Georgia, after the Georgia Supreme Court affirmed the judgment of the state habeas court. While his motion to proceed in forma pauperis was granted, his request for an evidentiary hearing and appointment of counsel was not ruled upon. The magistrate issued a report and recommendation denying relief on the merits and dismissing the action on May 8, 1983. Respondent timely filed objections on March 21, 1983, noting again the failure to rule on appointment of counsel or to hold an evidentiary hearing. The magistrate's report and recommendation was adopted without opinion by the district court on April 25, 1983 (Moye, J.).

Present counsel was appointed by the Eleventh Circuit.

**B. Statement of Facts**

Horace Dwayne Ford was indicted with Thomas Gary Ford and Pealie Mae Berry in the May Term of 1980, of the Superior Court of Dekalb County, Georgia, for the offenses of murder, armed robbery, aggravated assault, and conspiracy. Mr. Stanly Nylen was retained to represent Horace Ford and his brother, Thomas Ford.

On October 1, 1980, trial counsel filed a motion for discovery for each of the Ford brothers; he filed a motion for severance on October 3, 1980. The severance motion was based upon the statutory right to separate trials in cases in which the death penalty is sought. O.C.G.A. @17-8-4 (former Ga. Code Ann. @27-2101). No other discovery motions were filed. At the time of trial, counsel had not obtained several of the documents requested in discovery.

At the state habeas hearing, counsel testified that he was knew prior to the trial date that Thomas Gary Ford wanted to plead guilty, but that he had not previously communicated this to the district attorney. He stated that there had been no offer of a plea prior to the trial date. After recess and lunch on October 6, 1980, the district attorney finally solicited a plea, and at that time counsel communicated that Thomas Gary Ford wanted a plea but Horace did not. The district attorney stated an unconditional offer: either both defendants had to plead guilty or both go to trial.

Counsel was also quite aware that Horace Ford had unequivocally expressed his desire to go to trial for the seven months from indictment through the afternoon on the day of trial. Horace adamantly expressed this desire even after pretrial discussions about aggravating circumstances, after call of the case on October 6, 1980, after the message that his mother wanted the brothers to plead, after hearing about Pearlie's statement putting him and his brother at the scene, after counsel's explanation that Thomas Gary Ford could not testify on his behalf, and after he was first told that the court would not accept one plea without the other.

The habeas court did not allow trial counsel to give his opinion on whether the plea was voluntary. Mr. Nylen stated that he would not permit the two defendants to testify against each other. There was no testimony that Horace Ford was informed of what he was waiving in a plea, specifically the rights against compulsory self-incrimination, or to confrontation of witnesses, trial, or appeal. Nor is there anything in the record to suggest that Horace was ever informed of a potential conflict of interest in the joint representation, or of his right to conflict-free counsel.

## REASONS FOR DENYING THE PETITION

### A. Summary of the Argument

1. The Eleventh Circuit Court of Appeals correctly applied the actual conflict of interest test set forth in Cuyler v. Sullivan, 446 U.S. 335 (1980), in a joint representation case in which one attorney represented two co-defendants facing the death penalty, one client unequivocally wanted to proceed to trial while the other had wanted to plead, the plea bargain was expressly conditioned upon acceptance by both co-defendants on the trial date, and there was no waiver of conflict-free counsel. The client received no independent advice on whether to accept the plea bargain. The circuit court properly found that the plea was not knowing or voluntary and not the product of an informed choice.

2. The decision by the Eleventh Circuit Court of Appeals is consistent with this Court's decisions in Cuyler and Strickland and also with its own line of decisions. The circuit court undertook the threshold inquiry into attorney's performance, specifically whether there was active representation of divergent interests. The case does not create a per se bar against multiple representation. The holding is limited to the particular facts and circumstances of the case.

### B. Argument

#### I. The Eleventh Circuit properly found active representation of conflicting interests after consideration of the facts.

##### (a) Independent review was appropriate.

The Eleventh Circuit applied the correct standard of review in rejecting the magistrate's factual findings and legal conclusions, based on the record without an evidentiary hearing. The magistrate erroneously concluded that the state court findings of fact were entitled to the presumption of correctness.

Questions of historical fact on the voluntariness of the plea are given deference under 28 U.S.C. @2254(d). Marshall v.

Lonberger, 459 U.S. 314, 103 S.Ct. 843, 849, 74 L.Ed. 2d 646, 656 (1983). However, the voluntariness of a plea on federal constitutional grounds is an issue meriting independent review, and the state court determination is not entitled to the presumption of correctness. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The question of effective waiver of the constitutional rights involved in this case, including the right to conflict-free counsel, is also governed by federal standards. Marshall, supra, 103 S.Ct. at 849, Boykin, supra, 89 S.Ct. at 1712. The issue of effectiveness of counsel with respect to pretrial preparation and conflict of interest is a mixed question of law and fact. The reviewing court is entitled to substitute its own factual findings for those of the district court. Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied, 103 S.Ct. 1798 (1983).

The circuit court was authorized to disregard the magistrate's erroneous fact-findings, and his incorrect legal requirement of actual prejudice.

**(b) Only the facts necessary to the determination of active representation of actually conflicting interests were considered.**

A fair reading of the Eleventh Circuit's opinion as a whole clearly shows that the circuit court did not premise its decision on a presumption of prejudice resulting from a solitary factual finding that Horace wanted to proceed to trial while the co-defendant did not, as petitioner suggests. Rather, the Eleventh Circuit cited the Cuyler standard, adhering to Strickland's language requiring an "adverse effect on performance." Ford v. Ford, 749 F.2d 681, 682 (11th Cir. 1985). The language directs the reviewing court the examine the attorney's conduct.

Strickland and Cuyler do not require an affirmative showing of actual prejudice; rather, it is a limited (not per se) prejudice which results from 1) active representation of conflicting interests, and 2) an actual conflict adversely

affecting performance. 104 S.Ct. 2067.

There is no real dispute about whether trial counsel actively represented both Horace and Thomas Ford up until the time pleas were entered. Obviously, he was attorney or record for both defendants. On the fifth and the third days before trial, he filed a motion on behalf of both brothers. He consulted with both of them on the day of trial. He was attorney of record for both when the pleas were entered. This case does not present a problem as to whether representation of a former client would impair counsel's ability to effectively cross-examine a prosecution witness. The "active representation" prong is satisfied.

The Eleventh Circuit does rely upon the record to find that the co-defendants interests were divergent in that Horace wanted a trial while Thomas wanted a plea. This articulated divergence, especially considered with the plea bargain, was the clearest indication of "actually conflicting interests."

The Eleventh Circuit did consider other factors evidencing the conflict of interest, Id., 749 at 681, but these were not necessary to the determination that "actually conflicting interests were being represented" up through the time of the plea bargain. For example, counsel's statement that he would not let either client testify, and that Thomas could not testify on behalf of Horace if Horace went on to trial, is indicative of a potentially serious conflict. The clients would have lost their right to compulsory process and confrontation, or the attorney would have been in the untenable position of cross-examining his own client. See Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1960), Stephens v. U.S., 595 F.2d 1066 (5th Cir. 1979).

Counsel's lack of preparation for trial was also presented as additional evidence of the conflict. Counsel was aware of Horace Ford's strong reluctance to enter a plea from the outset and his discomfiture with the plea before and after the sentencing. Since Horace had continuously indicated he wanted a trial, and no plea

bargain was not forthcoming until the afternoon of trial, the attorney's duty was to investigate the case more carefully than if he had entered the case before trial and a defendant only wanted to plead guilty. Scott v. Wainwright, 698 F.2d 427 (11th Cir. 1983). Horace Ford's attorney had not subpoenaed any witnesses to court in spite of the fact that the state was still pursuing the death penalty and Horace was likely to suffer serious consequences upon a conviction. No defensive motions were filed; the discovery motion filed five days before trial did not allow the attorney to obtain requested documents prior to the sentencing, nor review these prior to Horace's entering the plea.

By itself, the inadequate preparation for trial might not constitute ineffectiveness, but it is a circumstance showing counsel's expectation of pleading the case (which was unrealistic on the morning of trial, but in accordance with Thomas' interests), and counsel's possible motivation for accepting the combined bargain. Certainly Horace Ford's plea was not voluntary in the face of the attorney's lack of preparation which increased the likelihood of conviction.

**(c) A vigorous advocate must give independent advice.**

The ultimate inquiry in an ineffectiveness claim is on fundamental fairness. That is, "counsel's conduct [must have] so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 446 U.S. ___, 104 S.Ct. 2052, 2064, 80 L.Ed. 674 (1984). "The purpose is simply to ensure that criminal defendants receive a fair trial." Id. 104 S.Ct. 2052 at 2065.

In applying the appropriate standards to the facts herein, the Eleventh Circuit found a case of divided loyalties. Ford, 749 at 682. Horace Ford's counsel was immeasurably impaired with respect to basic requirements of effective counsel:

"Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, 446 U.S. at 346, 90 S.Ct. at 1717. From counsel's function as assistant to

the defendant derive the overaarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adverarial testing process." [emphasis added] Strickland, supra at 2065.

Of course, the Strickland court indicates that there are kinds of state interference with counsel's assistance which results in a per se finding of prejudice, including interference with counsel's ability to make independent decisions about how to conduct a defense. Id., 103 S.Ct. 2052, at 2067. See also U.S. v. Cronic, 466 U.S. ____, 104 S.Ct. 2045, 2049, f. 31, 80 L.Ed.2d 674 (1984).

Petitioner's argument suggests that because the plea bargain was unconditional, in that both clients had to plead, counsel had no choice about whether to accept it; therefore, "he never had the opportunity to labor under a conflict of interest." (Petition, p. 9). Although the plea bargain was an unrelenting offer, the lawyer did indeed have several courses of action. He could have proceeded to trial for Horace and then solicited a plea bargain for Thomas. He could have gone to trial for both clients. He could have challenged the propriety of the plea bargain: a severance should have been effective on the day of trial in accordance with O.C.G.A. @17-8-4; due process required the cases to be considered separately.

Unfortunately, counsel was in a position of having clients who had clearly expressed different views on whether to proceed to trial. So, counsel went along with Thomas' interest in pleading. Counsel's interest in protecting one client from death by entering the plea took precedence over representing the other at a jury trial which he had insisted upon all along. If the plea bargain was not "interference with the attorney's ability to make independent decisions about how to proceed at trial," impairing counsel's effectiveness so that per se prejudice results it was certainly indicative of the actual conflict of interest which

counsel faced.

The Strickland court recognized that it is "difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Id. 104 S.Ct. 2052 at 2067. Petitioner would require a specific indication of the adverse impact upon the "quality" of the lawyer's representation of the two brothers (Petition, p. 10). Petitioner finds fault with the circuit court's failure to mention a particular instance where the attorney acted "to the benefit or detriment of either client" (Petition, p. 9). Also, petitioner urges the result would have been the same, in that a separate attorney could not have successfully obtained a plea bargain for the brother Thomas, because of the unconditional plea offer (Petition, p. 10).

The focus of this argument is misguided. Counsel's duties lay not in successfully plea-bargaining for any one client, but in the "vigorous advocacy of [each] defendant's cause," 104 S.Ct. 2052 at 2065, and the avoidance of conflicts. In this case, it meant counsel should have acted to ensure Horace Ford received a fair trial. The fact that the right to jury trial is constitutionally guaranteed, while plea-bargaining for Thomas is not, might have given priority to Horace's interests. This is the heart of the "actual conflict."

The circuit court did not have to inquire further into counsel's conduct on the issue of whether Horace Ford had a fair trial, or a fair testing of the adversary process -- he simply did not get a trial even though he wanted one. When the adversary process breaks down, due to counsel's action or a failure to act, the result is unreliable; deficient performance has prejudiced the defense. Speculation about a different result is pointless. No further showing of actual prejudice is required. Id, 104 S.Ct. 2052 at 2064.

The petitioner's calculus of benefit/detriment in measuring deficient performance has been more appropriately applied in

review of trial transcripts and in general ineffectiveness claims. In those situation, the problem of failure to present a defense, cross-examine, or argue is apparent on the record. However, Horace had asserted his right to a jury trial all along; he was hardly benefited by waiving most constitutional rights with the guilty plea.

**(d) The plea was not the product of an informed choice.**

Petitioner goes so far as to argue that the attorney did not advise, persuade, or influence Horace Ford to accept the plea offer, but was merely a conduit of information (Petition, pp. 11-12). If that is the case, it simply supports the circuit court's finding that the plea was not the product of an informed choice, which include a rational weighing of the advantages of entering a guilty plea or going to trial. Counsel had a minimal duty to give advice within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The failure to give this minimal advice another instance of counsel's deficient performance.

If petitioner's version is correct, the attorney completely failed to consult with Horace Ford on a matter about which consultation is required. Careful scrutiny is to be given to pleas taken without the assistance of counsel and without a valid waiver of the right to counsel. Brady v. U.S., 397 U.S. 742 at 748, f.6, 90 S.Ct. 1463 at 1469, 25 L.Ed.2d 747 (1970). Certainly the same protection is accorded in joint representation. As the Brady Court noted:

> "This mode of conviction [guilty plea] is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precaution against unsound results, and we should continue to do so, whether conviction is by plea or by trial." 397 U.S. at 758, 90 S.Ct. at 1474.

Of course, the attorney did convey quite a bit of information on the day of trial, once the plea offer was tendered. He told Horace that Thomas could not testify for him. He reiterated that the case against Thomas was strong, and going to trial would

likely result in the death penalty. At this point, however, he was already in a conflict of interest.

The subtleties of the adverse effect on performance are perhaps the most difficult to determine from the limited record in a plea bargain situation. There may be conduct off the record which shows a conflict. And it may be what counsel fails to do that constitutes the prejudice. That is why Cuyler adhered to the reasoning that once actual conflict and active representation is shown, the pervasive effect of conflicting loyalties makes an affirmative showing of prejudice "an exercise in unguided speculation." Holloway v. Arkansas, 435 U.S 475, 491, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978).

As this Court has recognized:

> "Even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's represenation of a client. And to assess the impact of a conflict of interest on the attorney's option, tactics, and decisions in plea negotiations would be virtually impossible." Holloway, 435 U.S. at 490-1, 98 S.Ct. at 1181-2; see also Cuyler, 446 U.S. at 356-7, 100 S.Ct. at 1722-3.

Nonetheless, the Eleventh Circuit did carefully examine the facts in the record to determine the "active representation" of the one attorney throughout the proceedings, and the divergent ("actively conflicting") interests of Horace asserting his right to trial and his brother's desire to plead. The impact on counsel's performance is self-evident: counsel did not go to trial for Horace Ford.

## II. No per se bar to multiple representation has been created.

Petitioner complains that the Eleventh Circuit failed to examine the attorney's conduct as to each defendant, and thus circumvented the requirement of examining performance. Because Stanley Nylen did not advise, encourage or persuade Horace Ford to accept the plea, petitioner contends, he did not act on behalf of Thomas' interests in avoiding the death penalty to the detriment of Horace; rather, petitioner argues, he was not in a position of actual conflict and there was no detrimental result attributable

to the attorney.

The Eleventh Circuit made explicit findings on the several factors that distinguish this case from others. The state definitely sought the death penalty during plea negotations, and had not waived it prior to the trial date. Ford, 749 at 683. The attorney did not have to persuade Thomas to plead guilty, since he "had already decided to plead." Id. 749 at 683. Horace had unequivocally wanted to go to trial. Id. 749 at 682. The attorney actively represented both clients up until the time pleas were entered. Obviously, he was attorney of record for both defendants, consulting with them through the day of trial, and appearing on their behalf at sentencing. Given the divergent interests of the two clients, counsel suffered a position of divided loyalties, which was not alleviated by the joint plea bargain. Id. 749 at 682-3. Counsel was aware of this divergence of interests before the trial date.

As previously noted, the Eleventh Circuit was authorized to disregard the magistrate's findings, which were not supported in the record, and his incorrect legal requirement of an affirmative showing of actual prejudice. Petitioner's argument that additional facts as to the attorney's conduct were required ignores the point that a conflict of interest can arise at any time. A conflict is not "assumed", as petitioner suggests, or only potential merely because the case does not go to trial. Plea bargains are perhaps the most obvious example of the manifest effect of a conflict at pretrial proceedings. Holloway v. Arkansas, 435 U.S. 475, 485, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978).

In recognition that the possibility of a conflict of interest in joint representation during pretrial consultations, hearings, and motions, and during trial, can render proceedings fundamentally unfair, the Georgia Supreme Court enunciated a mandatory rule in Fleming v. State, 246 Ga. 90, 270 S.E.2d 185

(June 9, 1980). Fleming requires co-defendants in which the death penalty was being sought to have separate and independent counsel. Petitioner argues that Ford creates a per se bar against multiple representation. To the contrary, the Georgia Supreme Court had already enunciated its Fleming prohibition against multiple representation in death penalty cases two weeks before Horace and Thomas Ford were jointly indicted on June 17, 1980. If the Georgia Supreme Court had followed its own Fleming rule, this case would already have been remanded to the trial court.

The Fifth Circuit had consistently held that not all cases of multiple representation result in a Sixth Amendment ineffectiveness violation before Cuyler's admonition was issued. See Foxworth v. Wainwright, 516 F.2d 1072, 1077 (5th Cir. 1975), cited in Cuyler, supra, at 100 S.Ct. 1718, f. 14. The Fifth and Eleventh Circuits have required the constitutional predicate issue of "active representation of actively conflicting interests"; even so, a factual inquiry in each case has determined if there is a constitutional violation. U.S. v. Freeman, 619 F.2d 1112, 1122 (5th Cir. 1980), cert. denied, 101 S.Ct. 1348 (1981); U.S. v. Alvarez, 580 F.2d 1251, 1255 (5th Cir. 1978); Baty v. Balkcom, 661 F.2d 391, 397 (1981); Westbrook v. Zant, 704 F.2d 1487, 1498 (11th Cir. 1983); Burger v. Zant, 718 F.2d 979, 989 (11th Cir. 1983).

Justice Marshall noted the ambiguity in the Cuyler decision as to the "adverse effect on performance" analysis. Cuyler, supra, 446 U.S. at 356-7, 100 S.Ct. at 1722-3. The Eleventh Circuit properly cited the standard in this case. Ford, 749 at 682.

On Horace Ford's guilty plea record, the court below examined what "the advocate [found] himself compelled to refrain from doing ..." Holloway, supra, 435 U.S. at 490-1, 98 S.Ct. at 1182, cited in Cuyler, 446 U.S. at 358, 100 S.Ct. at 1723. It was appropriate for the court below to examine a circuit case which involved representation of actively conflicting interests. In

Westbrook v. Zant, 704 F.2d 1487 (1983), the attorney's inaction in failing to file the viable jury challenge against the county, whom he had defended on a jury challenge, was due to the divergent interests of clients he represented. The adverse impact was the failure to fairly test the adversary process with the jury claim. Horace Ford's case is more extreme, and simpler: the clients were co-defendants, and the acceptance of the combined bargain meant there was no testing of the adversary process.

A client may still consent to joint representation in the Eleventh Circuit, but there must be an explicit waiver of the right to conflict-free counsel. Stephens v. U.S., 595 F.2d 1066 (5th Cir. 1979), U.S. v. Alvarez, 580 F.2d 1251, 1255 (5th Cir. 1978). This rule is in accordance with Justice Brennan's concurrence in Cuyler. Id. 100 S.Ct. at 1719; the protection is necessary for defendants whose attorneys fail to consider, or choose to ignore potential conflicts.

In Horace Ford's case, the record is silent on the issue of waiver of right to conflict-free counsel. The state has not sustained its burden to show the waiver was knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938), Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 270 (1962), Ford v. Wainwright, 526 F.2d 919 (5th Cir. 1976), Potts v. Estelle, 529 F.2d 450 (5th Cir. 1976).

Of course, Federal Rules of Criminal Procedure 44(c), as well as the ABA Code of Professional Responsibility, DR 5-105, EC 5-15 (1976), direct counsel to avoid conflicts, inform the court of possible conflicts, and encourage the federal courts to inquire into potential conflicts.

The Ford case has created no new limitations on multiple representation in the circuit. It is consistent with rulings by this Court, the ethical rules, and circuit decisions.

## CONCLUSION

Respondent strongly resists certiorari. The careful and factually limited decision by the Eleventh Circuit undertakes the correct analysis of the requirements of Cuyler and Strickland. Any further inquiry would be speculative. Because of the nature of relief accorded Horace Ford, briefing and argument would be appropriate if this Court decides to grant the writ of certiorari.

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CERTIFICATE OF SERVICE

I, Alice C. Stewart, appointed counsel of record for the respondent, hereby certify that in accordance with the Rules 46.5 and 28.3 of the Supreme Court, I have this date served one copy of the foregoing respondent's brief in opposition to the petition for writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit upon counsel of record for the petitioner by depositing one copy of the same in the U.S. mail with sufficient first class postage affixed thereto, addressed to:

Mr. William B. Hill, Jr., Esq.
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334.

This 21 day of June, 1985.

Alice C. Stewart
ALICE C. STEWART
Attorney for Respondent